STATE OF MICHIGAN
IN THE SUPREME COURT

MELISSA MAYS, MICHAEL ADAM MAYS, JACQUELINE PEMBERTON, KEITH JOHN PEMBERTON, ELNORA CARTHAN, and RHONDA KELSO,

Plaintiffs-Appellees,

v

GOVERNOR RICK SNYDER, STATE OF MICHIGAN, MICHIGAN DEPARTMENT OF ENVIRONMENTAL QUALITY, and MICHIGAN DEPARTMENT OF HEALTH AND HUMAN SERVICES,

Defendants-Appellants.
_____/

Supreme Court No. _____

Court of Appeals No. 335555

Court of Claims No. 16-000017-MM

Consolidated with Docket Nos. 335725 and 335726

The appeal involves a ruling that a provision of the Constitution, a statute, rule or regulation, or other State governmental action is invalid.

GOVERNOR SNYDER, THE STATE OF MICHIGAN, THE DEPARTMENT OF ENVIRONMENTAL QUALITY, AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICES' APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF JURISDICTION

Governor Snyder, the State of Michigan, the Department of Environmental Quality, and the Department of Health and Human Services (State Defendants) seek to appeal under MCR 7.303(B)(1) the decision of the Court of Appeals issued in this case on January 25, 2018. That decision and the Court of Claims' October 26, 2016 decision are attached to this application as Exhibits 1 and 2, respectively.

STATEMENT OF QUESTIONS PRESENTED

1. May a court read extra-statutory exceptions into the notice provision of the Court of Claims Act, which requires plaintiffs to plead in avoidance of the State's immunity?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

2. Should the judiciary create a money-damages claim (allegedly worth billions in this case) based on a substantive-due-process theory under Michigan's Constitution that would allow claims for a violation of bodily integrity resulting from environmental contamination?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

3. Do emergency managers qualify as state officials for purposes of the Court of Claims' jurisdiction?

   Appellants' answer: No.

   Appellees' answer: Yes.

   Trial court's answer: Yes.

   Court of Appeals' answer: Yes.

4. Can the population of an entire city pursue a remedy for property harms shared by many members of the public by bringing an inverse-condemnation claim based on the State's alleged failure to regulate?

Appellants' answer:	No.
Appellees' answer:	Yes.
Trial court's answer:	Yes.
Court of Appeals' answer:	Yes.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Article 1, § 17 of Michigan's 1963 Constitution

> No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law. The right of all individuals, firms, corporations and voluntary associations to fair and just treatment in the course of legislative and executive investigations and hearings shall not be infringed.

Article 10, § 2 of Michigan's 1963 Constitution

> Private property shall not be taken for public use without just compensation therefore being first made or secured in a manner prescribed by law.

MCL 600.6431

> (1) No claim may be maintained against the state unless the claimant, within 1 year after such claim has accrued, files in the office of the clerk of the court of claims either a written claim or a written notice of intention to file a claim against the state or any of its departments, commissions, boards, institutions, arms or agencies, stating the time when and the place where such claim arose and in detail the nature of the same and of the items of damage alleged or claimed to have been sustained, which claim or notice shall be signed and verified by the claimant before an officer authorized to administer oaths.
>
> (2) Such claim or notice shall designate any department, commission, board, institution, arm or agency of the state involved in connection with such claim, and a copy of such claim or notice shall be furnished to the clerk at the time of the filing of the original for transmittal to the attorney general and to each of the departments, commissions, boards, institutions, arms or agencies designated.
>
> (3) In all actions for property damage or personal injuries, claimant shall file with the clerk of the court of claims a notice of intention to file a claim or the claim itself within 6 months following the happening of the event giving rise to the cause of action.

MCL 141.1549(2)

> Upon appointment, an emergency manager shall act for and in the place and stead of the governing body and the office of chief administrative officer of the local government.

INTRODUCTION

The authority to create money-damages claims against the State resides with the Legislature, through its power to waive governmental immunity and its power to create remedies. But in this case, the Court of Appeals took it upon itself to create exceptions to governmental immunity—specifically, to the Court of Claims Act's notice provision—based on the Court's own policy views. The Court of Appeals also created a damages claim brought directly under the Michigan Constitution based on a substantive-due-process right to bodily integrity. And it allowed a large segment of the public—basically the entire population of Flint—to turn to the Judiciary, instead of to the Legislature, to remedy the problems associated with Flint's water system, by allowing an inverse-condemnation claim based on the State's regulatory or permitting decisions.

Each of these decisions undermines the separation of powers, and each individually presents questions of great significance to Michigan's jurisprudence. And on top of that, this case has great practical significance. The Legislature has already appropriated nearly $300 million to address the problems associated with Flint's water system.[1] Yet, without any Legislative input, the Court of Appeals authorized Plaintiffs to seek billions more from Michigan's taxpayers.

In short, this application satisfies not one, but all the grounds identified in MCR 7.305(B):

[1] http://www.michigan.gov/flintwater/0,6092,7-345-73947_78591---,00.html

- The Court of Appeals ruled that the Court of Claims Act's notice provision is unconstitutional as applied in this case. MCR 7.305(B)(1).

- The Court of Appeals exposed Michigan taxpayers to more than $40 billion in liability in this case against the State, Governor, and state agencies. MCR 7.305(B)(2).

- The State's immunity, the steps persons must take to seek taxpayer funds based on damage claims, and whether the State can appoint local officials who are not state officials are legal principles of major significance to the state's jurisprudence. MCR 7.305(B)(3).

- The Court of Appeals' decision is clearly erroneous because it ignored the Legislature in areas where the Legislature, not the Judiciary, has the prerogative to govern. The decision will also cause material injustice because it was conflicts with the actual record in this case. MCR 7.305(B)(5)(a).

- The Court of Appeals' decision conflicts with several Supreme Court decisions, including *Smith v Department of Public Health,* 428 Mich 540 (1987); *Jones v Powell*, 462 Mich 329 (2000); *Rowland v Washtenaw County Road Commission*, 477 Mich 197 (2007); *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378 (2007); *McCahan v Brennan*, 492 Mich 730 (2012); *Fairley v Department of Corrections*, 497 Mich 290 (2015); and *Spiek v Michigan Department of Transportation*, 456 Mich 331 (1998). The decision also contradicts several Court of Appeals decisions, including *Kincaid v City of Flint*, 311 Mich App 76 (2015); and *Blue Harvest, Inc v Department of Transportation*, 288 Mich App 267 (2010). MCR 7.305(B)(5)(b).

STATEMENT OF FACTS AND PROCEEDINGS

The Court of Appeals adjudicated this case as if it were purely a motion under MCR 2.116(C)(8) that looked only at the allegations in the complaint rather than what it was: a motion under MCR 2.116(C)(7) for which the Court was required to review the entire record. Even so, the Court of Appeals still disregarded dozens of paragraphs in the complaint in which Plaintiffs describe their knowledge of a potential claim against the State for more than a year before they filed their complaint.

I. The decision to switch to the Flint River as a water source in April 2014.

Until 1967, the City of Flint's primary water source was the Flint River, which it treated using the City's water treatment plant. (First Amend Compl, Ex A, App V, p 1.) In 1967 the City transitioned to purchasing treated water from the Detroit Water and Sewerage Department (DWSD) which obtained water from Lake Huron, but it continued to use the Flint River—still treated using the City's water treatment plant—as a backup water source. There were several times during which the City relied on its backup water source, the Flint River, when DWSD water was temporarily unavailable. (See *id.*)

By 2012, the City planned to change its primary water source from the DWSD pipeline to another Lake Huron pipeline to be constructed by the Karegnondi Water Authority (KWA). At the time, the City was under emergency management. Since joining the KWA would require entering into a contract with KWA in excess of $50,000 without a competitive bidding process, the City sent the proposal to the State Treasurer for review. MCL 141.1552(3). The review compared a number of water source options, including the Flint River, Genesee County, DWSD, KWA, or a combination of those sources. The State Treasurer received input from KWA officials, the KWA's engineering firm, Flint officials, DWSD officials, and Treasury's own engineering firm and Department of Environmental Quality (DEQ) officials. (See First Amend Compl, Ex A, App V, p 3.) The parties competing for Flint's business often presented conflicting information. But ultimately, the State Treasurer supported "the City of Flint's decision to join KWA"

considering the fact that "[t]he City's Emergency Manager, Mayor, and City Council all support this decision." (First Amend Compl, ¶ 48, note 2; see also First Amend Compl, Ex A, App V, pp 3–4 for additional detail.)

On April 16, 2013, Flint joined the KWA. The next day, DWSD notified the City that it would be obligated to deliver water to the City for only one more year. Because Flint could not obtain water from the KWA for several more years, it had to decide where to obtain water in the interim. Unlike Flint's decision to join the KWA, the State Treasurer was not involved in this decision. In June 2013, the City decided to use its backup source, the Flint River, as its primary source during the interim period. (First Amend Compl, Ex A, App V, p 5.) On June 26, 2013, the City contracted with an engineering firm, Lockwood, Andrews & Newnam (LAN), to prepare Flint's water treatment plant for full-time operation. (*Id.*) On that same day, the City notified the DEQ of its plan to use the Flint River as an interim drinking water source. (*Id.*) Three days later, on June 29, 2013, DEQ representatives met with representatives from the City, Genesee County, and LAN at Flint's water treatment plant. Both the City's Department of Public Works and the City's Finance Department recommended using the Flint River as an interim source of drinking water. (*Id.*)

The City, with guidance from the engineering firms it hired, LAN and Rowe, made several improvements to its water treatment plant in anticipation of the plant's full-time use. The City's water quality supervisor expressed concern first to Flint officials and later to DEQ employees in April 2014 about whether the Plant

was ready to distribute water on full-time basis. (See First Amend Compl, ¶ 57.) But following the completion of additional upgrades to the plant, the City officially switched its water source to the Flint River on April 25, 2014. (First Amend Compl, Ex A, App V, p 6.)

II. The events that happened after the switch to the Flint River but more than six months before Plaintiffs filed suit.

Plaintiffs allege that they "knew almost immediately after the switch to Flint River water that something was not right about this new water supply." (Compl, ¶ 58.) "Within days" of the switch, Plaintiffs began complaining to the State "that the water was cloudy and foul in appearance, taste and odor." (*Id.*, ¶ 59.) By "June 2014," Plaintiffs continued to complain to the State, and believed "that the water was making them ill." (First Amend Compl, ¶ 62.)

Although the DEQ regulates hundreds of water supply systems in the state, it does not operate them. See, e.g., MCL 325.1007. DEQ is not a water supplier. Instead, Flint's water supplier was and is the City of Flint. MCL 325.1002(t). The City was responsible for sampling its water, analyzing the samples for regulated contaminants, and reporting its findings to the DEQ. MCL 325.1007(1).

On July 1, 2014, the City began the first of two six-month rounds of sampling lead levels throughout its distribution system. The federal Lead and Copper Rule, which has been incorporated into Michigan law, requires water suppliers to evaluate new water sources, such as the Flint River, for two consecutive, six-month

periods to determine what type of treatment the supplier should implement for minimizing lead.[2] 40 CFR 141.81(d); Mich Admin Code, R 325.10604f(2)(d).

In "August 2014," the City's sampling showed that there were E. coli exceedances in some parts of the city's distribution system. (Compl, ¶ 60.) Plaintiffs allege that the City and DEQ "went into deliberate denial mode" (Compl, ¶ 63), but then acknowledge that the City—in consultation with the DEQ—sent boil-water advisories concerning E. coli to impacted areas of the City on August 15, 2014, notifying residents of the exceedances. (*Id*; First Amend Compl, Ex A, App V, p 7.) The initial advisories were lifted on August 20, 2014. (First Amend Compl, Ex A, App V, p 7.) On September 5, 2014, the City sent out a new round of boil-water advisories, again for E. coli exceedances. (*Id*; see also Compl, ¶ 60.) On September 7, 2014, the area to which the advisories applied was enlarged. (*Id*.) But both advisories were lifted by September 9, 2014. (*Id*.)

Contrary to Plaintiffs allegations that DEQ and the City disregarded problems with Flint's water quality, the City—in consultation with the DEQ—strived to flush its water mains to decrease the amount of stagnant water in Flint's oversized distribution system. (First Amend Compl, Ex A, App V, p 7.) The City also increased the amount of chlorine—a disinfectant—it added to the water. (*Id*.) The DEQ recognized that an increased use of chlorine could create a byproduct

[2] The U.S. Environmental Protection Agency determined in a November 3, 2015 memo that DEQ's interpretation of the Lead and Copper Rule was one of the possible interpretations of that rule.
https://www.epa.gov/sites/production/files/2015-11/documents/occt_req_memo_signed_pg_2015-11-03-155158_508.pdf

called total trihalomethanes (TTHM), and on September 10, 2014, it required Flint to generate a preemptive evaluation on how the City would manage potential TTHM exceedances. (*Id*.) The City hired LAN, the same engineering firm that had advised Flint how to put its treatment plant into full-time use, to prepare the report required by the DEQ. (*Id*.)

Following the boil-water advisories, Plaintiffs continued to "express[ ] their concerns about water quality in multiple ways." (Compl, ¶ 61.) Plaintiffs allege that they wrote letters, sent emails, and made telephone calls "to Flint and MDEQ officials." (*Id*.) Plaintiffs also notified "the media" of their concerns. (*Id*.) Plaintiffs organized "demonstrations on the streets of Flint." (*Id*; see also First Amend Compl, ¶ 79.) According to Plaintiffs' own allegations, these demonstrations were "well-publicized." (*Id*.)

On October 13, 2014, the General Motors plant in Flint announced that it was going to switch from the Flint River to another water source, "citing corrosion concerns." (First Amend Compl, Ex A, App V, p 7; First Amend Compl, ¶ 66.)

On November 1, 2014, the engineering firm Flint had hired to help it manage TTHM levels, LAN, issued its report. And on November 7, 2014, DEQ employees met with Flint and LAN to discuss TTHM levels in the City's distribution system. (First Amend Compl, Ex A, App V, p 7.) Despite Flint's efforts to flush its system and identify "bad valves," DEQ notified Flint on December 16, 2014, that Flint had exceeded TTHM levels for that quarter. (*Id*. at p 8.)

On December 31, 2014, the results of Flint's first six-month round of testing for lead showed that the City's 90th percentile lead levels were 6 parts per billion (ppb). (*Id.*) The Lead and Copper Rule establishes an "action level" for lead of 15 ppb. 40 CFR 141.80(c)(1); Mich Admin Code, R 325.10604f(1)(c). So Flint's level of 6 ppb for the six months preceding December 31, 2014, indicated lead levels in Flint were below the 15-ppb action level. On January 1, 2015, Flint started its second six-month round of sampling. (First Amend Compl, Ex A, App V, p 8.)

On January 2, 2015, Flint notified residents of the City—through a press release and mailings to all water customers—that it had exceeded TTHM levels the previous year. (First Amend Compl, Ex A, App V, p 8; see also Trachelle Young lawsuits, Dkt Entries 68 and 69.) Flint's Department of Public Works posted "Frequently asked Questions and Answers" about Flint's water system, TTHMs, bacteria, and the City's decision to use the Flint River to the City's website on January 13, 2015. (First Amend Compl, Ex A, App V, p 8.) On January 21, 2015, Flint held a public meeting to discuss water quality, to which many residents brought containers of water from their taps. (*Id.*) On February 2, 2015, the City's Department of Public Works sent a letter to all water customers "offering testing for discoloration, taste and odor." (*Id.* at p 9.) On February 2, 2015, the Governor awarded a $2 million grant to Flint to help it identify leaking water lines as part of the State's Distressed Cities program. (*Id.*) On February 6, 2015, one of Flint's news stations reported in response to the City's January 2, 2015 TTHM advisory

that the news channel's independent testing showed that Flint's water was within the U.S. EPA's standards for TTHM. (*Id.*)

On February 10, 2015, Flint retained a new engineering firm, Veolia, to help it address the exceedances the DEQ had identified and the concerns residents had raised. (*Id.* at 9.) Flint also formed the "City of Flint/Veolia Technical Advisory Committee." (*Id.* at p 10.)

During this time, Plaintiffs allege that they continued to complain to the State about Flint's water quality and that the water was "making them visibly sick." (Compl, ¶ 61; First Amend Compl, ¶ 77.) On February 17, 2015, Plaintiffs allegedly staged public demonstrations about the quality of the water. (Compl, ¶ 61; First Amend Compl, ¶ 79.)

On March 4, 2015, the City of Flint/Veolia Technical Advisory Committee held its first meeting. It had 17 members, including representatives from city, county, state, and federal governments, along with hospitals and universities. (First Amend Compl, Ex A, App V, p 10.) The next day, on March 5, 2015, the Citizens Advisory Committee organized by the City also met. It included "58 members representing various interests," including the lead Plaintiff in this case. (*Id.*)[3]

On March 12, 2015, Veolia issued its report on the Flint water system with advice on how to improve operational issues and control TTHM. The report did not

[3] The City's publicly available website lists the members of those two committees. https://www.cityofflint.com/public-works/water-advisory-committees/ (last accessed 2/26/2018).

address lead, but it determined that the City met standards for TTHM control. (*Id.*) On March 19, 2015, the City of Flint publicly responded to the 61 questions posed to it by the 58-member Citizens Advisory Committee at the March 5, 2015 meeting. (*Id.* at p 11.) On March 23, 2015, the Flint City Council voted to return to DWSD water. The City's emergency manager declined the resolution, citing the additional $1 million per month cost, and the understanding that "water from Detroit is no safer than water from Flint." (*Id.*) On April 24, 2015, DEQ staff confirmed to the EPA that the City was sampling for lead, but was not treating the water to control for corrosion of the pipes. (*Id.*, p 11.)

On May 20, 2015, the City of Flint/Veolia Technical Advisory Committee held its second meeting. The meeting summary indicated that "some attention has shifted to lead and copper concerns." (*Id.* at 12.)

On June 5, 2015, Plaintiffs' attorney, Trachelle Young, and the lead Plaintiff, Melissa Mays, filed a lawsuit in Genesee County. (*Id.* at 12; see also Trachelle Young lawsuits, Dkt Entries 68 and 69.) The plaintiffs in that suit were several community organizations and individuals, and the defendants were the City of Flint and the City's administrator. (Dkt Entries 68 and 69.) The June 5, 2015 complaint recounted many of the events described above, including citizen complaints and demonstrations, the E. coli and TTHM exceedances, GM's decision to stop using the water, and the City's attempts to address the problems. (Dkt 68, ¶¶ 4–49.) The plaintiffs alleged that they had consulted with water experts in February 2015 that had raised concerns about the corrosivity of Flint's water, and recommended

decreasing lime softening and the amount of ferric chloride the City was using. (*Id.*, ¶¶ 43–45 and Ex D to the complaint.)

In addition to an order requiring the City to switch back to DWSD, the plaintiffs sought damages. (*Id.*, ¶¶ 84, 88, 102, 111.) They alleged that Flint's water was "a major community concern" that had caused people and institutions to stop using Flint's water and "caused residents to move out of the City of Flint." (*Id.*, ¶ 38, 61.) The plaintiffs alleged that the water "pose[d] a major and serious threat to the health" of residents and that many "residents [had] complained of health issues as a result of lead" and other contaminants in the water. (*Id.*, ¶¶ 42, 76.)

On June 24, 2015, a U.S. Environmental Protection employee gave a copy of a draft report he had written to a Flint resident, who gave the report to a reporter. In the draft report, the U.S. EPA employee expressed concerns about lead levels in Flint. (First Amend Compl, Ex A, App V, p 13.) On July 2, 2015, U.S. EPA officials assured Flint and the DEQ that "it would be premature to draw any conclusions" from the draft report in part because the City's second six-month monitoring period for lead was not yet complete. (*Id.*)

On July 7, 2015, Ms. Young and the lead Plaintiff amended their complaint against the City. (Dkt 69.) They added the mayor of Flint as a defendant. They also expanded the group of plaintiffs to include members of their coalition who resided in Flint and purchased water from the City, including the elderly, those with an infant in the home, and those with compromised immune systems. (*Id*, ¶¶ 8–9.) The plaintiffs also added additional counts, including a gross negligence

claim. A primary basis for their gross negligence claim was that the City's treatment and sampling protocols has resulted in "lead exposure for Plaintiffs and the residents of the City." (*Id.*, ¶ 48.) Specifically, the plaintiffs alleged that the City was "adding ferric chloride" to the water without practicing "any corrosion control treatment," causing the corrosion of the lead service lines in the City. (*Id.*, ¶¶ 85–87, 108.)

Also on July 7, 2015, a news report was published based on the draft memo written by the U.S. EPA employee. (First Amend Compl, Ex A, App V, p 13.) The report claimed that lead was a major concern throughout the City. On July 10, 2015, the City submitted the results of its second six-month round of lead monitoring to the DEQ. (*Id.*, pp 12–13.) The spokesperson for DEQ indicated in a radio interview on July 13, 2015 that based on the City's samples for lead, lead was not a "broad problem" in the City. (*Id.* p 14.)

III. The events that happened in the six months before Plaintiffs filed suit—that is, after July 21, 2015.

The following events happened after July 21, 2015—which is the date six months before Plaintiffs filed the current suit. By July 27, 2015, the DEQ had concluded that Flint's second round of lead testing showed that lead levels had risen to 11 ppb, which was still below the federal action level of 15 ppb. (First Amend Compl, Ex A, App V, p 14.) DEQ employees reached this figure after removing two sample results that were not eligible for determining compliance with the Lead and Copper Rule. (*Id.*) See 40 CFR 141.86(a) (describing eligible sample sites). On

August 17, 2015 the DEQ required Flint to forego a study to determine appropriate treatment for lead, 40 CFR 141.81(d), and instead immediately begin treatment for lead. (First Amend Compl, Ex A, App V, p 14.)

After DEQ required the City to implement corrosion control treatment to control for rising lead levels, Virginia Tech University notified the City and DEQ that it would start collecting water samples in the City on August 23, 2015. (*Id.*, p 15.) By August 27, 2015, Virginia Tech found that many samples had elevated lead levels. (*Id.*) Media outlets widely reported Virginia Tech's conclusions that lead was a serious problem throughout the City, again prompting DEQ officials to rely on the official results certified by the City showing that lead levels City-wide were actually below the 15-ppb federal action level, and that DEQ had already directed Flint to expedite its corrosion control plan. (*Id.*, p 16.)

By September 9, 2015, in response to rising concerns about lead, the Michigan Department of Health and Human Services (DHHS) began to design an educational program to teach how to decrease the risk of lead exposure for children. (*Id.*, p 16.) Medical researchers in Flint, including researchers at Hurley Medical Center, also began to consider the potential for elevated blood lead levels in children. On September 11 and 22, 2015, the researchers requested data from DHHS' Childhood Lead Poisoning Prevention Program. (*Id.*, p 17.) On September 24, 2015, Hurley researchers held a press conference announcing that more children in the City than usual had elevated blood lead levels. DHHS responded on September 25, 2015, that the changes in blood lead levels were seasonal and fit an

annual pattern. (*Id.*, pp 18–19.) But less than a week later, DHHS agreed that the elevated blood lead levels in Flint exceeded seasonal levels, even though the levels were still not as high as they were as recently as 2010. (*Id.*, p 20.) On October 1, 2015, DHHS reported its findings regarding higher blood lead levels, the Genesee County Health Department declared a public health emergency, and Flint's mayor advised residents not to drink their water without a filter. (*Id.*)

On October 2, 2015, the Governor held a press conference in Flint at which he announced a 10-part plan to address Flint's water issues. The plan included expanding water testing in homes and schools, free water filters, accelerating corrosion control in Flint's water system, boosting lead education programs, expanding a technical advisory group to examine and address the issue, and implementing a lead line replacement program. (See *id.*, p 20.) By October 7, 2015, the State Budget Office had located $10.5 million in funds immediately available to implement the Governor's plan. (*Id.*) On October 14, 2015, the Legislature appropriated an additional $9.35 million to provide water filters, place additional staff in Flint schools, and reconnect Flint to DWSD. 2015 PA 143. On October 16, 2016, Flint reconnected to DWSD. (*Id.*)

By November 19, 2015, DHHS announced the blood testing results from the month of October. Of the 963 people tested, 24 had blood lead levels of 5 micrograms per deciliter (µg/dL) or higher. That is, 2 to 3 of every 100 people had elevated blood lead levels. (First Amend Compl, Ex A, App V, p 22.) To put 5 µg/dL into perspective, the median blood lead level for children in the United States under

age five in 1980 was 15 µg/dL. (EPA's Lead and Copper Rule Revisions White Paper, October 2016.)[4] In other words, *half* of the people tested in the United States who are currently adults between approximately 35–40 years of age had blood lead levels as children that were *three times higher* than what is now considered elevated.

By December 4, 2015, blood testing results showed that the rate of children under age six in Flint with blood lead levels of 5 µg/dL or higher had dropped to 3%. On December 11, 2015, DHHS released the results of blood tests taken since October 1, 2015. Of 1,386 children and adults tested, 39 had blood lead levels of 5 µg/dL or higher. That is, 2 to 3 of every 100 people had elevated blood lead levels. (First Amend Compl, Ex A, App V, p 23.) To put these results in greater perspective: at no point since the problems with Flint's water system began has the percentage of children with blood lead levels risen as high as it was in 2010, when not only in Flint, but in the entire state of Michigan, approximately 7.5% of children had blood lead levels of 5 µg/dL or higher. (DHHS Blood Lead Level Test Results, October 7, 2016.)[5]

[4] This white paper is publicly available at http://src.bna.com/jEj and comes from a reliable source. This is public, reliable information of which the Court should take judicial notice. MRE 201.

[5] Blood lead testing results have been regularly and publicly posted on www.michigan.gov/flintwater since at least November 2015. This is public, reliable information of which the Court should take judicial notice. MRE 201.

IV. Proceedings in this case.

Trachelle Young and Melissa Mays filed several additional lawsuits[6] after their initial suit in June 2015, including this one. They filed this suit in the Court of Claims, with additional plaintiffs and attorneys, on January 21, 2016. After State Defendants moved to dismiss the suit, Plaintiffs amended their complaint to append the report of the Flint Drinking Water Task Force, which included the timeline the parties have cited. State Defendants again moved to dismiss. The Court of Claims granted in part and denied in part State Defendants' motion on October 26, 2016. The Court ruled that a judicial exception to the plain language of MCL 600.6431(3) exists and that there was an issue of fact as to whether Plaintiffs satisfied the exemption. Additionally, the Court ruled that Plaintiffs could pursue a damages claim against the State and Governor based on the Michigan Constitution for allegedly violating Plaintiffs' bodily integrity. The Court also held that Plaintiffs had stated a claim for inverse condemnation in avoidance of State Defendants' immunity, and that emergency managers are state officials over whom the Court of Claims has jurisdiction. The Court dismissed Plaintiffs' state-created-danger claim

[6] Relying on the same general allegations as this suit and their June 2015 suit, Ms. Young and Ms. Mays have also filed tort claims in Genesee County Circuit Court, constitutional claims under 42 USC 1983 in federal district court, and tort claims against the U.S. Environmental Protection Agency in federal district court. Plaintiffs' ongoing litigation efforts are documented at their website. www.flintwaterclassaction.com. Ms. Mays also filed a claim under the federal Safe Drinking Water Act in federal district court. *Concerned Pastors v Khouri*, No. 16-10277 (ED Mich).

and rejected Plaintiffs' theory that the statutory fraudulent concealment provision applies to the Court of Claims Act's notice provision.

Both State Defendants and the Emergency Manager Defendants filed claims of appeal by right, and applications for leave to appeal. The Plaintiffs also filed a claim of appeal based on the Court of Claims' denial of their state-created-danger claim. The Court of Appeals granted the two applications for leave to appeal and consolidated them with the three claims of appeal.

In its opinion, the majority affirmed the Court of Claims' decision in all respects but one. It held that compliance with MCL 600.6431 can be an issue of fact, not a threshold legal issue; that there is a common-law "unreasonableness" exception to MCL 600.6431 if a person's claims are constitutional and that enforcing MCL 600.6431 at this point in the litigation would be unconstitutional; that, contrary to the Court of Claims' ruling, the fraudulent-concealment provision previously reserved for statutes of limitation also applies to the notice provision; that Plaintiffs can pursue a damages remedy against both the State and individuals for alleged violations of their bodily integrity under Michigan's Due Process Clause; that Plaintiffs cannot pursue a damages remedy under a state-created-danger theory; that Plaintiffs adequately pleaded an inverse-condemnation claim in avoidance of State Defendants' immunity; and that emergency managers are state officials over whom the Court of Claims has jurisdiction.

The dissenting opinion would have held that there is no exception to the notice provision, but that the provision has an inherent discovery rule. Yet even

under that discovery rule, Plaintiffs' own allegations confirm that they knew or should have known that they had potential claims against the State for personal and property damages much longer than six months before they filed suit. Accordingly, the dissent would have reversed the Court of Claims and ordered the dismissal of Plaintiffs' complaint in its entirety.

STANDARD OF REVIEW

The Court of Appeals' decisions related to the notice provision, constitutional torts, and inverse condemnation are all threshold immunity issues that this Court reviews de novo. Because those are dispositive motion issues raised under MCR 2.116(C)(7), the Court reviews the entire record and accepts as true only well-pleaded allegations that are not contradicted by the record. *Maiden v Rozwood*, 461 Mich 109, 119 (1999). The decision related to emergency managers is a question of statutory interpretation this Court also reviews de novo. *Jesperson v Auto Club Ins Ass'n*, 499 Mich 29, 34 (2016).

ARGUMENT

I. The Court of Appeals created equitable exceptions to the Court of Claims Act's notice provision contrary to this Court's holdings in *Rowland*, *Trentadue*, *McCahan*, and *Fairley* and to the plain language of the Revised Judicature Act.

From Michigan's founding until 1970, the Legislature, not the Judiciary, was the branch entitled to control the circumstances under which citizens can sue the government for damages. See *Rowland v Washtenaw Co Rd Comm'n*, 477 Mich 197, 206 (2007) (discussing the history of notice provisions). But between 1970 and

2007, this Court developed a body of case law that swung control of this area to the Judiciary. *Id*. at 206–209. That case law culminated in a rule that it was unconstitutional for courts to enforce notice statutes unless the government could show prejudice. *Id*.

In 2007, this Court corrected course and returned control of damage claims against the government to the Legislature. *Rowland*, 477 Mich 197. The Court observed that the period from 1970 to 2007 was "remarkable in the annals of judicial usurpation of legislative power" because during that period courts considered themselves authorized to amend notice statutes to bring them into line with the court's policy preferences. *Id*. at 213–214. But notice provisions are "social legislation" that need only a "rational basis" to be constitutional, and they in fact have several rational bases. *Id.* at 210. Indeed, the provisions are "necessary to the protection of the taxpayer, who bears the burden of unjust judgments." *Id*., quoting *Ridgeway v City of Escanaba*, 154 Mich 68, 72 (1908). Courts are not authorized to "rewrite the plain statutory language and substitute [their] own policy decisions for those already made by the Legislature." *Rowland*, 477 Mich at note 10, quoting *DiBenedetto v W Shore Hosp*, 461 Mich 394, 405 (2000). This Court recognized that this limitation on judicial authority applies even if following a statute's plain text might lead to the "harsh result of barring any lawsuit," *Trentadue v Buckler Lawn Sprinkler*, 479 Mich 378, 388 (2007), because the statute's limitations reflect the fact that "the Legislature has undertaken the necessary task of balancing plaintiffs' and defendants' interests," *id.* at 392.

This Court expressly applied *Rowland*'s holding to MCL 600.6431, the notice provision at issue in this case. *McCahan v Brennan*, 492 Mich 730, 733 (2012) (holding that "statutory notice requirements must be interpreted and enforced as plainly written and that no judicially created saving construction is permitted to avoid a clear statutory mandate"). This Court again confirmed the Judiciary's obligations in *Fairley v Department of Corrections*, 497 Mich 290 (2015). The Court ruled that "governmental immunity" is a "characteristic of government" and that persons must demonstrate, as a threshold legal matter, that they have "adhere[d] to the conditions precedent in MCL 600.6431(1)" before they can "successfully expose . . . state agencies to liability." *Id*. at 297–298, citing *Mack v City of Detroit*, 467 Mich 186, 198 (2002). Compliance with MCL 600.6431 *cannot* be a question of fact because a person must demonstrate compliance before the case can proceed. *Mack*, 467 Mich at 198 (a "plaintiff must plead her case in avoidance of immunity"). The Court of Appeals below disregarded these holdings.

A. The Court of Appeals' refusal to enforce the plain language of MCL 600.6431 was a usurpation of legislative power.

Section 6431's plain language requires persons asserting a claim against the State or its officers to file either a notice of intent to file a claim or the claim itself with the Court of Claims that, among other things, states "the time when . . . such claim arose." MCL 600.6431(1). And if they are asserting a claim for personal or property damages, they must file the notice or the claim itself within six months following "the happening of the event giving rise to the cause of action."

MCL 600.6431(3). Plaintiffs *complied* with this requirement in one important sense: they stated "the time when . . . such claim arose" by identifying "the happening of the event giving rise" to their asserted cause of action.

Plaintiffs filed a claim for personal and property injuries with the Court of Claims and alleged that the basis of their claim—the event that gave rise to their claim—was that their persons and their property were "exposed" to the "toxic Flint River water." (First Amend Compl, ¶¶ 7–9, 119–120.) The basis for Count I was that State Defendants allegedly "*exposed* Plaintiffs to dangerous, unsafe and untreated (or inadequately treated) Flint River water without regard to their knowledge that such *exposure* could and would result in widespread permanent serious damage . . . ." (First Amend Compl, ¶ 129 (emphasis added); see also ¶ 133.) Count II was similarly based on the allegation that State Defendants perpetuated "the ongoing *exposure* to contaminated water, with deliberate indifference to the known risks of harm which said *exposure* would, and did, cause to Plaintiffs." (First Amend Compl, ¶ 142 (emphasis added); see also ¶ 143.) Further, Count IV alleged that State Defendants "damaged property plumbing, water heaters and water service lines by *introducing* corrosive Flint River water into property water system[s]." (First Amend Compl, ¶ 150 (emphasis added).) Therefore, according to Plaintiffs, "the event giving rise to [their] cause of action," MCL 600.6431(3), was their "exposure" (and their property's exposure) to allegedly toxic Flint River water.

In compliance with MCL 600.6431, Plaintiffs thus identified "the time when" their "claim[s] arose" as April 25, 2014. Plaintiffs alleged that "since April 25, 2014

[they] *were* and continue to be *injured in person and property* because they were *exposed*" to the Flint River water. (First Amend Compl, ¶¶ 7–8 (emphasis added).) Indeed, Plaintiffs even picked that date—April 25, 2014—as the date to define an alleged class of people "who sustained personal and/or property injury . . . because of their *exposure* to toxic Flint River water . . . ." (*Id.*, ¶ 9 (emphasis added).)

Plaintiffs' candid admission of when their claims arose should have made this a straightforward case. Claims for personal or property damages must be filed "within 6 months following the happening of the event giving rise to the cause of action." MCL 600.6431(3). But Plaintiffs did not file their claim until January 21, 2016—nearly 21 months "following the happening of the event giving rise to the cause of action." *Id.* As a result, the Court of Appeals was required to dismiss Plaintiffs' case in its entirety. *McCahan*, 492 Mich at 752 (2012).

1. Compliance with MCL 600.6431 is not an issue of fact in this case, nor can it be.

The Court of Appeals decided that dismissing the case would be "premature" because Plaintiffs need discovery about "*whether* and *when* each plaintiff suffered injury and when each plaintiff's claims accrued relative to the filing of plaintiffs' complaint." (Ex 1, Op at 9.) The Court reasoned that discovery was necessary to determine "the time at which plaintiffs were first harmed" because the date of the water switch was "not necessarily the date on which plaintiffs suffered the harm giving rise to their causes of action." (*Id.*) In addition to the unusual logic that

Plaintiffs need discovery from State Defendants to determine if they are injured, there are at least three more significant problems with the Court's line of reasoning.

First, this Court held in *Fairley* that compliance with MCL 600.6431 is a threshold legal requirement a person must satisfy at the outset of a case for the case to move forward in avoidance of the State's immunity. 497 Mich at 297–298. The holding in *Fairley* accords with the established doctrine that unless the threshold criteria are satisfied, the State is immune not only to liability but also to suit—including expensive and time-consuming discovery proceedings. See *Ballard v Ypsilanti Twp*, 457 Mich 564, 567 (1998).

Second, the statute focuses on when the underlying wrong occurred, not on when a claimant suffered a harm. It requires the claimant to identify "the happening of the event *giving rise* to the cause of action" and "the time when . . . such claim *arose*." MCL 600.6431 (emphasis added). While suffering a harm might be necessary for a claim to fully accrue, the Legislature required claimants to identify not when a claim finally accrued, but when the claim first started to arise. Those words mean different things: "*Arise* may refer to the onset of the underlying wrong (e.g., exposure to asbestos), whereas *accrue* may refer to the ripeness of the claim (e.g., contraction of asbestosis or discovery of the disease)." Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed, 1995), p 16. By focusing on "the time and place where such claim *arose*" and on "the event *giving rise* to the cause of action," MCL 600.6431(1), (3), the Legislature focused on the underlying wrong (here, exposure to contaminated water) that *started* the chain of events, not on

when the claim fully ripened. Black's Law Dictionary (8th ed, 2004) (defining "arise" as "1. To originate; to stem (from)"); cf. MCL 600.5827 ("[T]he claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results."). But the Court of Appeals, turning to case law instead of the statute's plain text, equated "the happening of the event giving rise to the cause of action" with the time when "'all of the elements of an action for . . . injury, including the element of damage, are present.'" (Ex. 1, Op at 8–9.) If that were what the Legislature meant, it is hard to see why it focused on the beginning of a claim—on the event giving rise to the claim—rather than on it fully ripening.

Third, and most perplexing, the Court of Appeals' rationale fails on its own terms because its assertions about the harms are not supported by the record. The Court of Appeals made no citation to any portion of the record to support its finding that the water switch was "not necessarily the date on which plaintiffs suffered the harm giving rise to their causes of action" and that discovery was necessary to determine "the time at which plaintiffs were first harmed." (Ex 1, Op at 9.) The record already addresses these issues.

The basis of Plaintiffs' claims was that their persons and their property were "exposed" to the "toxic Flint River water." (First Amend Compl, ¶¶ 7–9, 119–120.) Plaintiffs alleged that that "since April 25, 2014 [they] *were* and continue to be *injured in person and property* because they were *exposed*" to the Flint River water. (First Amend Compl, ¶¶ 7–8.) (emphasis added.) In fact, Plaintiffs even sought to use "April 25, 2014" as the date to define the class they wished to certify. (*Id.*, ¶ 9.)

In short, there is no need for discovery to determine "the time at which plaintiffs were first harmed" because *Plaintiffs already tell us when they were first harmed*: April 25, 2014. The Court's attempt to couch its decision in the pseudo-discovery rule created by *Henry v Dow Chemical Company*, 319 Mich App 704 (2017), is equally unpersuasive because this Court unanimously vacated the relevant portion of that opinion in *Henry v Dow Chemical Company*, 905 NW2d 601 (Mich 2018). (See Ex 1, Op at 9.) The Court of Appeals' refusal to base its reasoning on the record of this case was plain error.

2. There is no basis for creating a "harsh and unreasonable" exception to the plain language of the Court of Claims Act's notice provision.

The Court of Appeals held that even if Plaintiffs did not comply with MCL 600.6431, that statute does not apply because enforcing the statute's plain language would be an unconstitutional divestiture of Plaintiffs' "access to the courts." (Ex 1, Op at 10–14.) That is more than even Plaintiffs requested. Plaintiffs abandoned their "harsh and unreasonable" argument at oral argument, and instead relied entirely on their fraudulent-concealment theory—which is discussed below. (1/9/18 Hr'g Tr, 26:5–27:24 (attached as Ex 3).)

The Court of Appeals justified its disregard of this Court's *Rowland* line of cases on the theory that those cases dealt with "legislatively granted rights, rather than on rights granted under the provisions of our Constitution itself." (Ex 1, Op at 11.) The Court held that it is a "long-standing principle" that the Legislature cannot constitutionally "impose a procedural requirement that would, in practical

application, completely divest an individual of his ability to enforce a substantive right guaranteed" by the constitution. (*Id*. at 10–11.) There are at least three significant errors with the Court's line of reasoning.

First, persons do not have a constitutional right to sue the State for damages; if they did, governmental-immunity statutes would be unnecessary, as under that theory the Constitution itself would abrogate immunity. But see *Mack v City of Detroit*, 467 Mich 186, 198, 201 (2002) (explaining that "governmental immunity is a characteristic of government" that bars suits unless there is a "statutory exception"). This Court recognized the possibility that courts could potentially, under the right circumstances, authorize a remedy whereby a person could pursue damages against the State based on a constitutional violation. *Smith v Dep't of Pub Health,* 428 Mich 540 (1987). But this Court did not hold that such a remedy is a constitutional right or resolve how a court could have the authority to alter that inherent characteristic of government. Indeed, until the Court of Appeals' decision below, no Michigan appellate court had ever authorized a claim for damages against the State under *Smith*.

Second, the Court of Appeals concluded that MCL 600.6431 was unconstitutional as applied in this case without following the requisite guidelines for reaching such a conclusion. The Court did not adhere to the doctrine that courts should "avoid an interpretation [of a statute] that creates a constitutional invalidity" if possible. *House Speaker v Governor*, 443 Mich 560, 585 (1993). The Court embarked on its equitable-exception analysis even though Plaintiffs had

abandoned the "harsh and unreasonable consequences" theory and made its finding of unconstitutionality merely an alternative basis for its holding. The Court of Appeals could have ruled for Plaintiffs without bringing the constitutional validity of MCL 600.6431 into doubt. Indeed, courts "exercise the power to declare a law unconstitutional with extreme caution . . . and it is only when invalidity appears so clearly as to leave no room for reasonable doubt that it violates some provision of the Constitution that a court will refuse to sustain its validity." *Phillips v Mirac, Inc*, 470 Mich 415, 422 (2004). Additionally, before a court can find a statute unconstitutional, "it is necessary to point out *specifically* what provision or provisions of the Constitution of the State prohibit the enactment of the legislation in question." *In re Brewster St House Site in City of Detroit*, 291 Mich 313, 334 (1939) (emphasis added). Neither Plaintiffs nor the Court identified the provision of the Constitution that MCL 600.6431 violates. In short, the Court of Appeals found MCL 600.6431 unconstitutional even though it did not need to, and without even specifying what provision of the Constitution the statute apparently violates.

In any event, *Trentadue* makes clear that courts have no authority to insert equitable exceptions into statutes based on the courts' policy views. Indeed, *Trentadue* rejected this exact type of equitable exception—one based on "the harsh result of barring any lawsuit" where the plaintiff did not have sufficient knowledge of his injury—as intruding on the Legislature's authority to make these sorts of policy judgments. 479 Mich at 389.

Finally, the Court of Appeals based its constitutional analysis on something other than the record in this case. The Court concluded that "the event giving rise to the cause of action was not readily apparent at the time of its happening . . . because the evidence of injury was concealed in the water supply infrastructure buried beneath Flint and in the bloodstreams of those drinking the water supplied via that infrastructure." (Ex 1, Op at 12–13.) Yet the Court cited to no portion of the record to support these conclusions. The truth is that *no Plaintiff* alleges that he or she had elevated blood lead levels. *No Plaintiff* alleges that she had no reason to believe she had a potential claim against the State until October 2015. The actual record tells a very different story from the Court of Claims' conclusions.

As detailed above in the Statement of Facts, Plaintiffs' own allegations show that they "knew almost immediately after the switch to Flint River water [on April 25, 2014] that something was not right about this new water supply." (Compl, ¶ 58.) "Within days" of the switch, Plaintiffs began complaining to the State "that the water was cloudy and foul in appearance, taste and odor." (*Id.*, ¶ 59.) By "June 2014," Plaintiffs continued to complain to the State and believed "that the water was making them ill." (First Amend Compl, ¶ 62.) Additionally, starting in the summer of 2014, Plaintiffs allege that they wrote letters, sent emails, and made telephone calls "to Flint and MDEQ officials." (Compl, ¶ 61.) Plaintiffs do not explain why they did not transform their letters and emails into the written notices of intent required by MCL 600.6431. Plaintiffs also allege that beginning in the summer of 2014 they organized "demonstrations on the streets of Flint," notified

"the media" of their concerns, and ensured their demonstrations were "well-publicized." (*Id*; see also First Amend Compl, ¶ 79.)

Any doubt whether Plaintiffs had reason to believe they had a claim based on water contamination was resolved when Trachelle Young, the Plaintiffs' attorney in this case, and Melissa Mays, the lead Plaintiff, *filed a lawsuit* against Flint more than six months before they filed this suit. (Dkts 68 & 69.) Among other things, they sought damages on behalf of a large group of Flint citizens, alleging that Flint's failure to properly treat water had exposed them to dangerous levels of lead. Ms. Young, Ms. Mays, and their coalition had even consulted water experts and alleged that Flint was failing to adequately treat their water to protect their pipes from corrosion. (Dkt 69, ¶¶ 85–87, 108.)

According to Plaintiffs' *own allegations* and the record in this case, Plaintiffs had sufficient information within weeks of April 25, 2014, to satisfy the "minimal procedural burden" of filing a notice of their intent to file a claim. See *Rusha v Dep't of Corrections*, 307 Mich App 300, 312 (2014). Had they done so, they would have had three years, or until April 26, 2017, to file their actual complaint. MCL 600.6452. As the dissent below pointed out, "had plaintiffs been reasonably diligent in their attempts to comply with the notice provision of the [Court of Claims Act], any claimed inequitable results required in this case could have been entirely avoided." (Ex 4, Dissenting Op at 11.)

The Court of Appeals also concluded, without citing any support in the record, that State Defendants "successfully manipulated the public" by "actively

concealing information that a claim had accrued and the notice period had begun." (Ex 1, Op at 13, n 9.) But DEQ worked with the City of Flint when the City acknowledged water problems by sending out *public notices* of E. coli and TTHM exceedances, by hiring outside engineering firms to advise it on how to treat the water to address the concerns raised by residents, holding press conferences, posting information to its website, offering free water testing to residents, and establishing both professional and citizen advisory groups. (First Amend Compl, Ex A, App V, pp 7–13.) The idea that the government's actions somehow stripped Plaintiffs of "any knowledge of a possible claim" (Ex 1, Op at n 9) is further disproved by the fact that Ms. Young and Ms. Mays *filed a claim* based on water problems more than six months before they filed this case. Plaintiffs' apparent belief that the comments of a DEQ spokesperson in a radio interview on July 10, 2015 (First Amend Compl, ¶ 93) somehow erased 14 months-worth of lived experience prior to that interview is unsupported and not credible. The Court of Appeals' conclusion that problems with Flint's water were not public knowledge until "October 2015" is equally implausible. (Ex 1, Op at 9.) Plaintiffs themselves allege that they demonstrated in the streets, notified the media, and ensured that their demonstrations were well covered in the press at least a year before that date. (Compl, ¶ 61; see also First Amend Compl, ¶ 79.)

3. The fraudulent-concealment provision does not apply to the Court of Claims Act's notice provision, and it would not change the result in this case if it did.

Without any support from the statute's language, the majority below held that the Legislature intended to extend the notice period under MCL 600.6431(3) from six months to two years if there was "fraudulent concealment" of a claim. (Ex 1, Op at 14–17.) The majority conceded that the Legislature's intent was "not explicit[ ]," but determined that the interplay between the fraudulent concealment provision of the Revised Judicature Act, MCL 600.5855, the Court of Claims Act's statute of limitations, MCL 600.6452, and the Court of Claims Act's notice provision, MCL 600.6431, was ambiguous enough to justify "judicial construction" of the statute. (*Id.* at 15–16.) The majority acknowledged that the Legislature expressly applied the fraudulent-concealment provision only to the statute of limitations in the Court of Claims Act. But it reasoned that the fraudulent-concealment provision could not be "practically applied" in the Court of Claims if it applied only to the statute of limitations, so the Legislature must have also intended to apply it to the notice provision notwithstanding the absence of language indicating that intention. (*Id.* at 16.) There are at least three significant errors with the Court's reasoning.

First, the Court assumed without explanation that a statutory notice and a legal pleading are identical. As the dissent below recognized (Ex 4, Dissenting Op at 10–11), a person does not need as much information to file a notice of intent as they do to file a lawsuit, which is why a person still has three years to file a lawsuit if they file a notice of intent, MCL 600.6452(1). A notice of intent is a "minimal

procedural burden" that is "significantly less" burdensome than a legal pleading. *Rusha*, 307 Mich App at 312 (citations omitted).

Second, the majority's reasoning is flatly contradicted by the plain language of MCL 600.6452(2), which imports the fraudulent-concealment provision only to "this section"—that is, only to § 6452, which is the Court of Claims Act's statute of limitations—and not to § 6431, which is its notice provision. That is why the Court of Claims below (Ex 2 at p 11, n 4), the dissent below (Ex 4 at 5), and the previous three panels of the Court of Appeals to consider the question all ruled that the Legislature did not apply the fraudulent-concealment provision to the notice provision. See *Brewer v Central Michigan Univ Bd of Trustees*, unpublished opinion per curium of the Court of Appeals, issued November 21, 2013 (Docket No. 312374), p 2; *Zelek v State of Michigan*, unpublished opinion per curium of the Court of Appeals, issued October 16, 2012 (Docket No. 305191), p 2; *Super v Dep't of Transp*, unpublished opinion per curium of the Court of Appeals, issued July 14, 2009 (Docket No. 282636), p 2.

Finally, even if the Legislature *did* intend to apply the fraudulent-concealment provision to the notice provision, it would not change the outcome of this case. The fraudulent-concealment provision does not apply if a plaintiff knows, or should know, that he or she has a "possible" cause of action. *Doe v Roman Catholic Archbishop of Archdiocese of Detroit*, 264 Mich App 632, 643–647 (2004). As detailed above, Plaintiffs' own allegations demonstrate that they had reason to believe they had a possible cause of action long before they filed suit. Indeed,

Plaintiffs' attorney and the lead Plaintiff even filed a lawsuit more than six months before this suit, putting to rest any doubt as to whether Plaintiffs believed they had a possible cause of action.

II. Without Legislative authorization, and without explaining why doing so would not be a violation of the separation-of-powers doctrine, the Court of Appeals authorized Plaintiffs to seek billions in taxpayer funds.

For the first time in the state's history, and without Legislative authorization, the Court of Appeals authorized a damage remedy against the State arising directly under the Michigan Constitution based on a theory of substantive due process. To be sure, 30 years ago this Court held in *Smith,* 428 Mich 540, that courts could create such a remedy under the right circumstances. But those circumstances do not exist here.

The Court of Appeals' decision has breathtaking financial ramifications. In Plaintiffs' pending case against the U.S. EPA, Plaintiffs have demanded $1,107,300,000 on behalf of themselves and others, for a total of 2,627 people. (Ex 5, Amend Compl in *Burgess v United States*, ¶ 136.) That is approximately $421,507 per person. In this case, Plaintiffs seek to certify a class that, based on Plaintiffs' allegations, would potentially include more than the entire population of the City of Flint, which is nearly 100,000 people. (First Amend Compl, ¶¶ 119–127.) Assuming Plaintiffs use the same metric to calculate personal and property damages against the State as they did for calculating those damages against the U.S. EPA and that their class is certified, Plaintiffs plan to demand up to

$42,150,700,000 from Michigan's taxpayers, with the lion's share going to Plaintiffs' attorneys. That is more than $40 billion. To put that figure into perspective, it is more than 75% of the State's entire 2017–2018 budget of $54.9 billion.[7]

And the impact does not stop there. If the Court of Appeals' decision stands, any person who characterizes their tort injuries as a "violation of their bodily integrity under the substantive-due-process doctrine" now has a direct path to taxpayer funds. Yet the State's budget is finite. To pay Plaintiffs' claims and the future claims that will come following the Court of Appeals' decision, the Legislature will have to withdraw funding from some other source, such as roads, schools, law enforcement, environmental protection, or Great Lakes restoration.

That the Court of Appeals unilaterally exposed Michigan's taxpayers to billions of dollars in claims without explaining why it is better suited than the Legislature to do so, and that it did so when *none* of the circumstances contemplated by Justice Boyle in her concurring opinion in *Smith* are present, should make this Court reconsider the viability of the authorization it provided in *Smith*. At the very least, this Court should provide guidance to lower courts similar to the guidance the U.S. Supreme Court has provided in its line of cases interpreting *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971), which is the case on which *Smith*'s holding is based.

[7] http://www.michigan.gov/documents/budget/FY17_Exec_Budget_513960_7.pdf.

A. The U.S. Supreme Court has walked *Bivens* back for more than thirty years, and this Court should do the same or more with *Smith*.

Both the lead opinion and primary concurring opinion in *Smith* discuss *Bivens* and its progeny in detail. 428 Mich at 613–636 and 641–652. In *Bivens*, federal agents entered Mr. Biven's home, searched it, and arrested him—all without a warrant. 403 US at 389. Mr. Bivens filed suit for damages against the federal agents, alleging violations of the Fourth Amendment. *Id*. at 389–390. The Court recognized a gap in federal jurisprudence: if a *state* agent had violated Mr. Bivens' rights under the Fourth Amendment, Mr. Bivens could have filed a suit for damages against the agent under 42 USC 1983. But Congress had not authorized such remedy against *federal* agents. The Court reasoned that federal courts regularly created damage remedies for violations of federal statutes even if the statutes did not contain a remedy, and there was no reason not to apply that same reasoning to create a remedy directly under the Fourth Amendment. *Id*. at 396. As Justice Harlan succinctly put it in his concurring opinion: "For people in Bivens' shoes, it [was] damages or nothing." *Id*. at 410.

The U.S. Supreme Court authorized two additional *Bivens*-style remedies in 1979 and 1980. *Davis v Passman*, 442 US 228 (1979); *Carlson v Green*, 446 US 14 (1980). But in the 38 years since, the Court has rejected nine consecutive requests to expand *Bivens*, primarily because the persons already had adequate remedies available. *Bush v Lucas*, 462 US 367 (1983) (federal civil service provided adequate remedy); *Chappell v Wallace*, 462 US 296 (1983) (military review board provided adequate remedy); *United States v Stanley*, 483 US 669 (1987) (Congress has special

control over military); *Schweiker v Chilicky*, 487 US 412 (1988) (Social Security Administration provided adequate remedy); *FDIC v Meyer*, 510 US 471 (1994) (*Bivens* not available against federal agencies); *Correctional Servs Corp v Malesko*, 534 US 61 (2001) (state tort action sufficient remedy); *Wilkie v Robbins*, 551 US 537 (2007) (administrative and judicial remedies already available); *Minneci v Pollard*, 565 US 118 (2012) (state tort action sufficient remedy); *Ziglar v Abbasi*, 137 S Ct 1843 (2017) (injunctive relief and habeas proceedings provide sufficient remedies).

In its latest case, *Ziglar*, the Court detailed the history of *Bivens* cases and explained what changed. The "prevailing law" when *Bivens* was decided was that federal courts should "provide such remedies as necessary to make effective a statute's purpose"—regardless of "the statutory text itself." *Ziglar*, 137 S Ct at 1855 (citations omitted); see *Bivens*, 403 US at 396. The Court has since abandoned that approach entirely, deferring to the policy Congress creates through statutory language rather than supplementing Congressional policy with judicial opinions. *Id.*, citing *Alexander v Sandoval*, 532 US 275, 286–287 (2001). Similarly, the Court came to recognize that "it is a significant step under separation-of-powers principles for a court to determine that it has the authority, under the judicial power, to create and enforce a cause of action for damages . . . to remedy a constitutional violation." *Ziglar*, 137 S Ct at 1856. For this reason, the outcome in *Bivens* "might have been different if [it] were decided today." *Id.* Indeed, the current state of the law is what the dissenting justices in *Bivens* had advocated for at the time. *Bivens*, 403 US at 412 (C.J. Burger) ("Legislation is the business of the Congress, and it has the

facilities and competence for that task—as we do not."); *id.* at 430 (J. Blackmun) (deriding the majority opinion as "judicial legislation").

Michigan law has experienced a similar evolution since *Smith* was decided. When it comes to authorizing statutory rights of action against private persons, this Court once took a "freewheeling approach" that vaguely allowed courts to "imply" rights of action from statutes where the existing remedy was "plainly inadequate." *Myers v City of Portage*, 304 Mich App 637, 643 n 12 (2014), discussing *Pompey v Gen Motors Corp*, 385 Mich 537, 553 (1971), and *Gardner v Wood*, 429 Mich 290, 302 (1987). Now this Court focuses exclusively on legislative intent. *Lash v City of Traverse City*, 479 Mich 180, 193 (2007); see also *Office Planning Group, Inc v Baraga-Houghton-Keweenaw Child Dev Bd*, 472 Mich 479, 499 (2005), discussing *Alexander v Sandoval*, 532 US 275 (2001). And when it comes to authorizing statutory rights of action against the *government*, this Court flatly refuses to do so "without express legislative authorization." *Lash*, 479 Mich at 194.

Those same decisions also indicate that this Court has also grown more deferential to the authority of the Legislature to create public policy. Compare, e.g., *Pompey*, 385 Mich 537, 553 (1971) ("[A] person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy . . . notwithstanding the statute did not expressly give him such right or remedy."), with *Lash*, 479 Mich at 194 ("[P]laintiff cites no authority, and we are aware of none, that would permit the creation of a cause of action for monetary damages . . . simply because other available remedies are less economically advantageous to plaintiff. It is not within the authority of the

judiciary to redetermine the Legislature's choice or to independently assess what would be most fair or just or best public policy.").

If *Smith* were decided today, it likely would come out differently—just as *Bivens* would have come out differently if decided today. The Legislature has already attempted to "make uniform the liability of . . . the state, its agencies and departments . . . for injuries to property and persons" in the Governmental Tort Liability Act, 1964 PA 170, MCL 691.1401, *et seq*. Over the course of various amendments to that Act, the Legislature has balanced the policy considerations related to subjecting state agencies and employees to tort liability. Yet the Court of Appeals below did not account for how its ruling would affect that Act or otherwise interfere in legislative policy.

This Court should reconsider the authority it provided in *Smith*. At the very least, the Court should provide clear guidance to lower courts in line with the guidance the U.S. Supreme Court has provided for performing a *Bivens* analysis: the separation-of-powers doctrine is paramount, and courts should authorize a new remedy only in the highly unusual circumstance that doing so would be an effective deterrent and the plaintiff has no alternative remedy.

B. None of the conditions contemplated by Justice Boyle are present in this case.

This Court has relied on Justice Boyle's concurrence in *Smith* to analyze the contours of constitutional torts. *Jones v Powell*, 462 Mich 329, 336 (2000). Justice Boyle identified several conditions that should be present before it would be

appropriate for a court to authorize a damage remedy against the State. None of them are present in this case.

First, the remedy can go only against the State, not individuals, and only when the State's custom or policy "mandated" the action that caused the constitutional violation. *Smith*, 428 Mich at 643. Immunity "would continue to bar suit for cases in which the only possible liability of the state is based on respondeat superior." *Id.* Here, the Court of Appeals allowed suit against the Governor, even though this Court has confirmed that constitutional torts are not available against individuals. *Jones*, 462 Mich at 335. And there is no basis in Michigan law for finding that a judgment against an official in his or her "official capacity" is the equivalent of a judgment against the State. Compare MCL 600.6458 & 600.6096 (requiring judgements against the State to be paid by an existing or supplemental appropriation), with MCL 691.1408 (giving agencies discretion whether to pay judgments against agency officers and confirming that "[t]his section does not impose liability on a governmental agency").

Additionally, Plaintiffs did not identify the state policy that "mandated" the actions they allege violated their bodily integrity. Instead, their allegations are based on the discretionary acts of either emergency managers, who are not state officials, or DEQ or DHHS employees, none of whom are parties to this case. (See, e.g., First Amend Compl, ¶¶ 93, 96, 98–100, 105–107.) Plaintiffs seek to impute the acts of individuals to the State and its institutions without identifying a policy that *mandated* the individuals to "expose" Plaintiffs to "toxic water." (See *id.*, ¶ 133.)

This is the type of respondeat superior liability Justice Boyle indicated could not sustain a constitutional tort. *Smith*, 428 Mich at 643; see also *Pembaur v City of Cincinnati*, 475 US 469 (1986) (the decision of an official was government policy only because the official was authorized to set the policy and explicitly ordered others to violate the plaintiffs' rights).

Second, under *Smith* courts can create a new remedy only when faced with "the stark picture of a constitutional provision violated without remedy." 428 Mich at 647. Here, as noted, Plaintiffs have already filed suit against several state officials, including the ones on whose actions their complaint against the State are based, in federal district court under 42 USC 1983. They have also filed state tort actions against those same officials and an action against the U.S. EPA. This is a far cry from a scenario in which Plaintiffs have no other remedy available.

Third, courts must consider the "clarity of the constitutional protection and violation" before unilaterally creating a remedy. *Smith*, 428 Mich at 651. The Court of Appeals admitted that this factor weighs against the creation of a remedy. (Ex 1, Op at 29.) Indeed, Justice Boyle noted that the "substantive guarantees of due process . . . are troubling in their indeterminate character." *Smith*, 428 Mich at 651 (citation omitted). Like the U.S. Supreme Court, this Court is reluctant to expand the concept of substantive due process "because guideposts for responsible decision-making in this unchartered area are scarce and open-ended." *Collins v City of Harker Hts, Tex*, 503 US 115, 125 (1992); see also *People v Sierb,* 456 Mich 519, 523 (1998). Despite the lack of clarity, the Court of Appeals authorized a

damage remedy for the "invasion of bodily integrity"—a concept with no obvious limiting principle.

Finally, Plaintiffs have not demonstrated a violation of substantive due process. The Court of Appeals acknowledged that no Michigan court had ever recognized "a stand-alone constitutional tort for violation of the right to bodily integrity." (Ex 1, Op at 28.) Accordingly, the Court of Appeals examined federal case law. To give a tort constitutional dimensions, federal case law requires, at the very least, that the government action "shock the conscience." *Range v Douglas*, 763 F3d 573, 588 (CA 6, 2014). The Sixth Circuit limits that to government conduct that involves the use of physical force. See, e.g., *Braley v City of Pontiac*, 906 F2d 220, 226 (CA 6, 1990) ("We doubt the utility of such a standard outside the realm of physical abuse . . . ."). Yet Plaintiffs do not demonstrate any kind of physical abuse by State Defendants. Additionally, state action arises to the "shocks the conscience" standard only if it indicates a "harmful purpose." *Range*, 763 F3d at 591–92. The conduct must show that the actor *intended* physical harm. *County of Sacramento v Lewis*, 523 US 833, 853 (1998). Yet the record does not support a finding that State Defendants *intentionally* caused Plaintiffs any physical harm.

In some situations, "deliberate indifference" can meet the shocks-the-conscience standard. *Lewis*, 523 US at 853. But "even where the governmental actor is subjectively aware of a substantial risk of serious harm," that standard is not satisfied "if his action was motivated by a countervailing, legitimate governmental purpose." *Hunt v Sycamore Community Sch Dist Bd of Ed*, 542 F3d

529, 542 (CA 6, 2008). For example, EPA officials gave false and misleading statements to the public at the site of the World Trade Center attacks about dangerous air pollutants. *Lombardi v Whitman*, 485 F3d 73, 83 (CA 2, 2007). In analyzing *Lombardi*, the Sixth Circuit noted that those false statements "were meant to calm the public to encourage people to return to their normal lives." *Hunt*, 542 F3d at 542. Because the EPA faced "conflicting obligations"—seeking to restore public order, but knowing that the statements "would endanger the plaintiffs' health"—its misrepresentations "would not shock the conscience." *Id*.

This case is similar in one sense: the DEQ officials here attempted to avoid unnecessarily alarming the public in Flint. But unlike the EPA officials in *Lombardi*, their statements were not false (let alone knowingly false)—they were based on Flint's lead sampling figures, which showed that Flint's lead level had not risen above the federal action level. (First Amend Compl, Ex A, App V, pp 8, 14.) Additionally, all of the blood lead sampling data from Flint indicates that only a small percentage of people had an elevated blood lead levels, and those percentages were still lower than they were as recently as 2010. (*Id*. at 22–23.) In this context, Plaintiffs cannot show that State Defendants' actions meet the "shocks the conscience" standard for a substantive-due-process violation.

III. The Court of Appeals found that emergency managers are state officials even though the Legislature made clear that they are not.

In its decision, the Court of Appeals established a vague, common-law-style "totality of the circumstances" analysis to conclude that emergency managers are

state officials or employees over whom the Court of Claims has jurisdiction despite the Legislature's plain indications to the contrary. (Ex 1, Op at 18–23.) The Court of Appeals' holding is incorrect.

A. The Court of Appeals failed to apply the more specific statute governing the Court of Claims' jurisdiction over emergency managers.

The Court of Appeals' holding that any person appointed by the State is automatically a state official (Ex 1, Op at 21) makes it impossible for the Legislature to create positions filled by a state appointee that that the Court of Appeals would *not* consider to be a state official. But whether a public official is a state official cannot be determined solely by the source of the official's authority because the State is the source of *all* governmental authority in Michigan.

This Court has already confirmed that the question whether a public official is a *state* official is one of legislative intent. *Schobert v Inter-Co Drainage Bd of Tuscola, Sanilac & Lapeer Cos for White Creek No 2 Inter-Co Drain*, 342 Mich 270, 282 (1955) ("[T]he term 'State officer' will be governed by the purpose of the act or clause in connection with which it is employed.") In *Schobert*, the Court examined the act creating drain commissioners to identify the contours of their authority, including whether it was of statewide application or "primarily local in extent and character." *Id*. at 284. 2012 PA 436 is the law that created the position of emergency manager and should be the focus of this discussion under *Schobert*.

Despite this, the Court of Appeals concluded that PA 436 was a "red herring" (Ex 1, Op at 19) and that it should instead examine the definition of state officers in

the Court of Claims Act, specifically in MCL 600.6419(7). But PA 436 is the more specific statute as to the precise issue here—the jurisdiction of the Court of Claims over emergency managers—and so it controls over the more generic definition in the Court of Claims Act. PA 436 specifically addresses the Court of Claims' jurisdiction over emergency managers, and it gives the Court of Claims jurisdiction over only certain claims *brought by* an emergency manager or review team. MCL 141.1552(1)(q); MCL 141.1567(1). The act states nothing about suits *against* local emergency managers. That the Legislature expressly mentions the former scenario and not the latter indicates that the Legislature deliberately excluded the latter scenario. See *Michigan Ass'n of Home Builders v Dir of Dep't of Labor & Economic Growth*, 481 Mich 496, 500–501 (2008) (applying the doctrine that "the expression of one thing is the exclusion of another").

The Court of Appeals also misinterpreted MCL 600.6419 by holding that any state officer can *bring* a claim against any person in the Court of Claims and reasoned that emergency managers are like state officials in that respect because they are also authorized to bring certain claims in the Court of Claims. (Ex 1, Op at 21, citing MCL 600.6419(1)(b).) But § 6419(1) does not authorize state officers to *initiate* litigation; it grants jurisdiction over claims "against the state," MCL 600.6419(1)(a), and allows only state officers who have *already been sued* in the Court of Claims to bring *counterclaims*, MCL 600.6419(1)(b).[8]

[8] The Court of Appeals also believed that persons are entitled to jury trials in the Court of Claims (Ex 1, Op at 40), even though the Court of Claims Act always has and still does forbid jury trials. MCL 600.6443.

B. The Court of Appeals' holding disregards the plain language of PA 436.

Looking at the broader context of how the Legislature has described emergency managers further confirms that the Legislature did not intend for them to be treated as state officers. Under PA 436, emergency managers are authorized only "to act for and in the place and stead of the governing body and the office of chief administrative officer of the local government." MCL 141.1549(2); see also *Kincaid v City of Flint*, 311 Mich App 76, 87–88 (2015) (holding that emergency managers cannot act on behalf of the Governor). Like the drain commissioners in *Schobert*, the authority of emergency managers is "primarily local in extent and character": their authority is not coextensive with state boundaries, they do not head state departments, nor do they administer state affairs. See *Schobert*, 342 Mich 270 at 284.

The Legislature distinguished state officials from emergency managers in at least three separate provisions of PA 436. First, the Attorney General is obligated to defend "the authority of a state official or officer acting under this act" if that authority is challenged. MCL 141.1560(2)(b). Despite this, PA 436 expressly obligates the Attorney General to also defend the "authority of an emergency manager" if that authority is challenged. MCL 141.1560(2)(c). Had the Legislature intended emergency managers to be state officials, then section 1560(2)(c)'s requirement for the Attorney General to defend the authority of emergency managers would have no meaning because that duty would have already been

included in section 1560(2)(b)'s existing requirement to defend the authority of "state officials."

Second, PA 436 eliminates all causes of action "against . . . any officer or employee of this state acting in his or her official capacity" for "any activity authorized by [PA 436]." MCL 141.1572. For emergency managers, however, PA 436 expressly contemplates the possibility a cause of action would proceed against them, and requires the local government to pay for emergency managers' insurance policies, representation, and any judgments issued against emergency managers. MCL 141.1560(4) & (5). These provisions expecting legal claims against emergency managers would have no meaning if the Legislature intended the elimination of causes of action against state officials in MCL 141.1572 to apply to emergency managers. It is also anomalous to require local governments to pay for the insurance policy and be responsible for judgments obtained against a "state official."

Third, PA 436 imposes on emergency managers the ethical standards required of state officials. MCL 141.1549(9)(c). If emergency managers were already state officials, this would have been unnecessary. This section is particularly revealing because it refers to an emergency manager as a "public servant" and a "public officer," but it stops short of referring to an emergency manager as a "*state* officer." MCL 141.1549(9) (emphasis added). Instead, for the limited purpose of applying an ethical standard reserved for state officials to an emergency manager, the section treats the emergency manager "*as if* he or she *were* a state officer." MCL 141.1549(9)(c) (emphasis added). Thus, the Legislature

applied select provisions of an existing body of law to emergency managers that otherwise would apply in its entirety if emergency managers were state officials. Again, if the Legislature intended emergency managers to be state officials, this limited application would be superfluous.

C. The comparison of emergency management to court-created receivership is inapt.

The Court of Appeals concluded that the Legislature intended emergency management to be the equivalent of court-created receivership because the Legislature used the word "receivership" in MCL 141.1542(q). (Ex 1, Op at 21.) There is no indication the Legislature intended such a dramatic result. Emergency management was created entirely by the Legislature, and its character should be analyzed using the Legislature's language, not the common-law stemming from *court*-created receiverships. Nevertheless, the Court of Appeals concluded that emergency managers are agents of the State because court-appointed receivers are agents of the court. (Ex 1, Op at 22, citing *In re Guaranty Indemnity Company*, 256 Mich 671, 673 (1932).) That conclusion contradicts the Court of Appeals own holding in *Kincaid*, in which the Court determined that emergency managers do *not* act on behalf of the Governor. 311 Mich App at 87. It also contradicts PA 436, which authorizes emergency managers to act only on behalf of the *local* government. MCL 141.1549(2). The Court of Appeals' analysis must be reversed.

IV. The Court of Appeals authorized essentially an entire city to assert a takings claim based on the State's alleged failure to regulate, which is unprecedented in scope and contrary to this Court's guidance.

Michigan courts have long been sensitive to the risk of opening the door too wide to takings claims. A government, after all, is not like a private actor; it cannot "reduce its risk of potential liability by refusing to engage in a particular activity." *Ross v Consumers Power Co*, 420 Mich 567, 618–19 (1984) (citation omitted). It "must continue to govern and is required to furnish services that cannot be adequately provided by any other agency." *Id*.

For this reason, Michigan courts have determined that an alleged failure to license, failure to supervise, or failure to regulate cannot be the basis of a takings claim. *Attorney General v Ankersen*, 148 Mich App 524, 561–62 (1986); see also *Hinojosa v Dep't of Natural Resources*, 263 Mich App 537, 549–50 (2004) (discussing *Ankerson* and holding as a "settled principle[ ]" that a failure to act cannot form the basis of an inverse-condemnation claim). Instead, the government must take an "affirmative act" that is "*directly aimed* at [the person's] property." *Blue Harvest, Inc v Dep't of Transp*, 288 Mich App 267, 277 (2010).

Plaintiffs' takings claim is based on the "introduc[tion of] corrosive Flint River water into property water system." (First Amend Compl, ¶ 150.) But the record in this case confirms that the State did not select Flint's water source: Flint did. The Emergency Manager Defendants acknowledged this fact at oral argument in response to the Court of Appeals' questioning. (Ex 3, 1/9/18 Hr'g Tr, 20:1–21:5.) Therefore, Plaintiffs' takings claims against the State are not that the State selected Flint's water source, but that the State—specifically the DEQ—did not

adequately regulate Flint's treatment of its water. The Court of Appeals did not acknowledge this distinction, instead collapsing the State Defendants and Emergency Manager Defendants into its vague reference to "defendants." (Ex 1, Op at 35–37.)

By refusing to distinguish between State Defendants and Emergency Manager Defendants, the Court of Appeals removed the longstanding barrier requiring "affirmative" government action for a takings claim, and opened the door for people to assert takings claims against the State based on its ordinary permitting and regulatory decisions. For example, the State is required to issue permits to local governments before the local government can dredge a wetland. MCL 324.30311. If the State issues a permit to a local government and the local government takes a person's property during its dredging operation, the person could assert a takings claims against the State under the Court of Appeals' rationale simply by suing both the State and the local government and alleging that the State's permit was part of the overall operation. This is a major change to the state's inverse-condemnation jurisprudence.

The Court of Appeals further altered the state's inverse-condemnation jurisprudence by virtually eliminating the requirement that the government's affirmative action must have been "directly aimed" at the person's property. *Blue Harvest*, 288 Mich App at 277. Or as this Court expressed the requirement, the person must demonstrate that the injury to his or her property is "different *in kind*, not simply in *degree*, from the harm suffered by *all persons similarly situated*."

Spiek v Michigan Dep't of Transp, 456 Mich 331, 348 (1998). This requirement is not just about limiting the number of takings claims. It is also about the separation of powers. As this Court observed, "[w]here harm is shared in common by many members of the public," a "judicial remedy" is not appropriate. *Id.* at 349. Instead, "the appropriate remedy lies with the legislative branch and the regulatory bodies created thereby . . . ." *Id.*

Plaintiffs' allege that their harm is "unique or special" and distinct from other water users because they "had water service lines and plumbing susceptible to damage by corrosive water." (First Amend Compl, ¶ 154.) But *all* water service lines and plumbing are susceptible to damage by corrosive water. Plaintiffs only allege that their harms are different in *degree* than other water users—which falls short of what this Court requires to support a takings claim. *Spiek*, 456 Mich at 348. Yet the Court of Appeals allowed the claim—potentially on behalf of an entire city—because Flint water users allegedly experienced the harm to a greater degree than water users statewide. (Ex 1, Op at 37.) By disregarding *Spiek*, the Court of Appeals opened the door to takings claims from large groups of persons in variety of circumstances, which is precisely what this Court sought to avoid. *Id.* at 349.

CONCLUSION AND RELIEF REQUESTED

State Defendants request that the Court vacate the Court of Appeals' opinion in its entirety and remand this case with direction to dismiss Plaintiffs' complaint. In the alternative, State Defendants request that the Court grant this application and permit briefing on all the substantive issues decided by the Court of Appeals.

Respectfully submitted,

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